

600 West Broadway, Suite 1800
San Diego, California 92101-3375
Tel: +1.619.236.1234 Fax: +1.619.696.7419
www.lw.com

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January 16, 2009

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

File No. 030815-0018

Re: Petition for Reconsideration - Clean Water Act Section 401 Water Quality
Certification for EPA's Vessel General Permit

Dear Members of the Board:

On behalf of our client, General Dynamics NASSCO ("NASSCO"), we submit this Petition for Reconsideration of the State Water Resources Control Board ("State Board") staff's issuance of the Order for Clean Water Act Section 401 Certification (the "401 Certification") for EPA's NPDES General Permit for Discharges Incidental to the Normal Operation of Vessels ("Vessel General Permit"). NASSCO appreciates State Board staff's efforts to address certain discharges by vessels. However, in light of the absence of sufficient evaluation of the feasibility of complying with the 401 Certification, and the need for further technical analysis and public comment, NASSCO respectfully petitions the State Board, pursuant to Title 23, California Code of Regulations § 3867 *et seq.*, to reconsider the conditions and requirements contained in the 401 Certification. NASSCO further requests that the State Board stay the implementation of the conditions of the 401 Certification for the reasons outlined below and in the attached affidavit.

In addition to the arguments set forth in this letter, NASSCO agrees with, and incorporates by reference, the arguments submitted by the Pacific Merchants Shipping Association in its Petition for Reconsideration and Request for Stay ("PMSA Petition").

NASSCO is a shipbuilding and repair company, specializing in auxiliary and support ships for the U.S. Navy, and oil tankers and dry cargo carriers for commercial markets. Located in San Diego, California, NASSCO is the only major ship construction yard on the West Coast of the United States. NASSCO must operate the vessels that it constructs to test and certify systems under normal operating conditions prior to transferring title of the vessels. Hence, as a result of its operations, NASSCO is subject to the provisions of the Vessel General Permit.

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I. NAME, ADDRESS, AND TELEPHONE NUMBER OF PETITIONER

General Dynamics NASSCO
2798 Harbor Drive
San Diego, CA 92113
Attention: T. Michael Chee
Telephone: 619-544-7778
Email Address: mchee@nassco.com

II. SPECIFIC ACTION WHICH THE STATE BOARD IS REQUESTED TO RECONSIDER

NASSCO incorporates by reference the specific State Board action referred to in the PMSA Petition. Further, NASSCO requests that the State Board reconsider the following conditions contained in the 401 Certification:

1. all sampling requirements;
2. all numeric effluent limitations;
3. all testing requirements; and
4. all reporting requirements.

III. DATE ON WHICH THE CERTIFICATION ACTION OCCURRED

The 401 Certification was issued by the Executive Director of the State Board on December 17, 2008.

IV. STATEMENT OF REASONS WHY THE ACTION WAS INAPPROPRIATE OR IMPROPER

NASSCO incorporates by reference the arguments made in the PMSA Petition and adds the following comments:

A) NO OPPORTUNITY FOR MEANINGFUL PUBLIC COMMENT WAS PROVIDED PRIOR TO THE ISSUANCE OF THE FINAL 401 CERTIFICATION

The State Board issued a Public Notice of the Application for Water Quality Certification (the "Notice") on August 27, 2008. While the Notice described the requirements of the federal Vessel General Permit, it did not include any specific information regarding any requirements that Board staff contemplated adding to the Vessel General Permit through the 401 Certification, and the State Board staff did not indicate at any time prior to December 17, 2008 that it planned to add extensive onerous conditions. Stakeholders did not have the opportunity to comment on any conditions prior to the issuance of the Order of Certification on December 17, 2008. Due to the compressed time schedule imposed by the USEPA, the 401 Certification was issued in the absence of data, scientific study, or public comment. The consideration of public comments and an in-depth technical evaluation are essential for such a comprehensive regulatory scheme that

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has far-reaching consequences for commerce and the environment. As currently written, the 401 Certification does not represent a fully informed and scientifically sound approach to regulating discharges from vessels.

B) THE STATE BOARD DID NOT COMPLY WITH CEQA PRIOR TO ISSUING THE 401 CERTIFICATION

The State Board initially received a letter from USEPA on June 27, 2008, requesting issuance of the 401 Certification. This certification request was denied on August 5, 2008 because State Board staff concluded that the compressed time schedule in USEPA's June 27, 2008 letter did not allow the State Board enough time to comply with the California Environmental Quality Act ("CEQA"). On August 22, 2008, the State Board staff reversed its position and committed to taking an expedited approach to the 401 certification under a Class 8 categorical exemption from CEQA. That exemption simply does not apply here, nor is NASSCO aware of any prior instances where the State Board applied this categorical exemption to any other certifications. The August 5, 2008 letter clearly demonstrates the State Board staff's awareness that the 401 Certification was subject to CEQA requirements. Subsequent communications with USEPA regarding a compressed time schedule do not lawfully excuse compliance with the provisions of CEQA. The State Board staff has unreasonably expanded the Class 8 categorical exemption beyond its terms.¹ Allowing a Class 8 categorical exemption for the 401 Certification would run counter to the legislative purposes of the Act.

C) THE STATE BOARD DID NOT EVALUATE THE FEASIBILITY OF COMPLYING WITH THE CONDITIONS PRIOR TO ISSUING THE 401 CERTIFICATION

The stated purpose of the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act") is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000)² The 401 Certification does not conform to that purpose given that the State Board staff has not considered the economic burden imposed by its conditions.

The 401 Certification issued by the State Board adds requirements that go far beyond what is practical or even feasible. Affected parties will not be able to comply with the 401 Certification conditions should the implementation period commence on February 7, 2008. The

¹ See *McQueen v. Mid-Peninsula Regional Open Space*, 202 Cal. App. 3d 1136 (1988) (holding that categorical exemptions to CEQA are to be construed strictly and shall not be unreasonably expanded beyond their terms).

² See also, Cal. Water Code § 13241 (stating that water quality objectives in water quality control plans should take into consideration water quality conditions that can "reasonably be achieved" as well as "economic considerations").

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401 Certification regulates 28 types of discharges, 20 of which require effluent sampling and 3 of which require sampling of receiving water. Testing of each effluent sample must be performed by a State certified laboratory for more than 155 chemical constituents. There is no indication whether testing and reporting is required on a periodic basis or for each individual discharge occurrence. There is also no evidence to suggest that the chemicals or compounds required for testing are even present in the covered discharges or pose any threat to water quality.

NASSCO is concerned that the time constraints placed on the 401 Certification have precluded key affected parties from providing the State Board with relevant information vital to the creation of vessel discharge requirements that can be practically implemented, and standards that are reasonably achievable. Even in those circumstances where conditions may eventually be satisfied, they can not be met within 45 days (by February 6, 2008), because a significant amount of time is needed to modify the vessels to allow for sampling, obtain agency approvals for same, conduct sampling, analyze the samples, study possible solutions if any issues are detected, retrofit or upgrade equipment, certify the modifications, identify and implement new BMPs, and possibly install new treatment systems. These events necessarily must occur in series, and can not be accomplished in the time between the issuance of the 401 Certification and the effective date of the Vessel General Permit.

For example, of the 20 types of discharges where effluent sampling is required, at least 8 of them require physical modifications to the vessels to even allow for sampling to occur. Prior to modification, the organization that regulates ship construction, ABS, requires shipbuilders to obtain approval for the modification. Not only is it uncertain whether such approvals can be obtained, it is impossible to do so prior the effective date of the 401 Certification.

Moreover, State Board staff should evaluate the significant amount of data and analyses compiled under the Uniform National Discharge Standards ("UNDS") study that was conducted for the better part of a decade by EPA and the United States Navy. Staff indicated that it did not review existing data in connection with the issuance of the 401 Certification. NASSCO understands that there is a great deal of information gathered by the UNDS study which should be considered prior to issuance of conditions for the 401 Certification.

D) THE STATE BOARD DID NOT CONSIDER WHETHER THE ECONOMIC BURDEN OF COMPLIANCE WITH THE 401 CERTIFICATION BEARS A REASONABLE RELATIONSHIP TO OBTAINED BENEFITS

California Water Code section 13267 requires that the economic burden of any waste discharge monitoring program bear a reasonable relationship to the need for the reports and the benefits to be obtained from them. The State Board staff has not analyzed the economic burden of compliance with the 401 Certification monitoring and reporting provisions. Indeed, there has been absolutely no study into whether the requirements are feasible to implement and necessary for water quality.

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E) **THE 401 CERTIFICATION INCLUDES EFFLUENT LIMITATIONS AND OTHER STANDARDS DERIVED FROM THE CALIFORNIA OCEAN PLAN THAT ARE NOT APPLICABLE TO VESSEL DISCHARGES**

Moreover, the 401 Certification includes standards adopted from the California Ocean Plan (and other water quality objectives); however, vessel discharges have been exempt under the Ocean Plan, and the State Board has never studied the application of those standards to vessel discharges. Those water quality plans must first be amended through formal rulemaking (which provides for public comment) before they can be applied to vessel discharges. The Board can not apply water quality standards to discharges which are *expressly excluded* in the Ocean Plan without first completing an economic impact analysis.³

F) **THE TERMS AND CONDITIONS IN THE 401 CERTIFICATION EFFECTIVELY BECOME NATIONAL STANDARDS AND SUBSTANTIALLY AFFECT INTERSTATE COMMERCE IN VIOLATION OF THE DORMANT COMMERCE CLAUSE**

The 401 Certification has the potential to affect a large number of vessels that move through interstate waters and thus is likely to place a substantial burden on interstate commerce.⁴ California ports serve as the nation's gateway to the global economy, and thousands of exporters and importers across the country rely on them as their primary entry for trade. The 401 Certification covers large vessels which are highly mobile and routinely move from port to port, state to state, and country to country. Most of the affected vessels inherently traverse multiple state lines. As a result, the vessel discharge requirements set forth in the 401 Certification, which is far more stringent than those certifications issued by other states, may indeed become the default vessel discharge standards for the rest of the nation. For example, when vessels that do not usually visit ports in California suddenly find a need to do so, they will not be able to enter waters of the State due to the risk of non-compliance with California's unique and onerous effluent limitations, resulting in potential enforcement proceedings, including fines and penalties. Those ships would not be able to offload cargos in California ports, creating an unreasonable burden on interstate commerce. Hence, the conditions of the 401 Certification are unconstitutional.

This nationwide (and arguably global) impact of the 401 Certification magnifies the need for thorough review, analysis and public comment before implementation.

³ See *Cities of Arcadia, et al. v. State Water Resources Control Board, et al.* (Super. Ct. Orange County, 2007, No. 06CC02974)

⁴ See *United States v. Locke*, 529 U.S. 89,108 (2000) (holding that a state law which affects international maritime commerce should be "consistent with the federal statutory structure, which has as one its objectives a uniformity of regulation for maritime commerce").

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V. **THE MANNER IN WHICH PETITIONER IS AGGRIEVED**

NASSCO and other affected parties will suffer significant harm if they are required to immediately comply with the conditions set forth in the 401 Certification. See attached affidavit. There has been no established protocol for compliance with the imposition of numeric effluent limitations on such a broad range of routine vessel discharges, or for the performance of the sampling, testing and reporting required by the State Board. It is technologically infeasible to comply with such an expansive regulatory program prior to February 6, 2009, as discussed above.

VI. **SPECIFIC ACTION THAT PETITIONER REQUESTS BE TAKEN BY THE STATE WATER BOARD**

NASSCO incorporates by reference the specific requested action referred to in the PMSA Petition under this section. In addition, NASSCO requests that the State Board hold workshops to obtain input from the public and regulated community, and stay implementation of the conditions of the 401 Certification pending completion of that public process.

VII. **LIST OF PERSONS (IF ANY) OTHER THAN PETITIONER, ITS MEMBERS, AND APPLICANT KNOWN TO HAVE AN INTEREST IN THE SUBJECT MATTER OF THE PETITION**

NASSCO incorporates by reference the list of persons referred to in the PMSA Petition under this section.

VIII. **STATEMENT THAT THE PETITION HAS BEEN SENT TO THE EXECUTIVE DIRECTOR AND TO THE APPLICANT**

A true and correct copy of this Petition for Reconsideration/Review was sent via facsimile and email on January 16, 2009 to the following individuals:

State Water Board Representative

Dorothy Rice
Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

EPA (Applicant) Representative

Douglas E. Eberhardt
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901

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IX. **COPY OF A REQUEST TO THE EXECUTIVE DIRECTOR FOR
PREPARATION OF THE STATE WATER BOARD'S STAFF RECORD**

By copy to the Executive Director, NASSCO hereby reiterates the request by PMSA for preparation of the State Board's Staff Record.

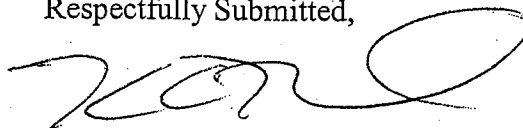
X. **SUMMARY OF THE MANNER IN WHICH AND TO WHAT EXTENT
PETITIONER PARTICIPATED IN ANY PROCESS LEADING TO THE
ACTION OR FAILURE TO ACT IN QUESTION**

NASSCO did not submit formal written comments in response to the State Board's Public Notice of Application for Water Quality Certification issued on August 27, 2008. The notice did not contain any information regarding any requirements contemplated to be added to the 401 Certification and NASSCO had no indication that the 401 Certification would dramatically expand the requirements of the Vessel General Permit. NASSCO did not have an opportunity to participate in the process leading to the 401 Certification because the State Board did not issue a draft version of the 401 Certification for formal public notice and comment prior to the Executive Director's issuance of the document as final on December 17, 2008. Indeed, the failure to provide sufficient notice is one of the bases on which NASSCO is petitioning for reconsideration.

CONCLUSION

NASSCO appreciates the State Board staff's apparent willingness to meet with certain organizations regarding the 401 Certification. Provided that NASSCO receives notice of such discussions, it intends to provide input and participate should the State Board reconsider the 401 Certification and stay implementation of its conditions. The time constraints placed on the 401 Certification process have precluded affected vessel owners from providing the State Board with relevant information vital to the creation of vessel discharge standards that can be feasibly implemented. NASSCO respectfully petitions the State Board to reconsider the 401 Certification in order to engage in a public review and comment process, and to perform appropriate and necessary technical evaluations. NASSCO looks forward to working cooperatively with the State Board staff to develop a scientifically sound and workable solution, and firmly believes an open dialogue between the State Board staff and affected vessel owners will result in reasonably achievable conditions protective of water quality in California.

Respectfully Submitted,



Kelly E. Richardson
of LATHAM & WATKINS LLP

cc: Jeannette Bashaw, SWRCB

AFFIDAVIT OF T. MICHAEL CHEE

I, T. Michael Chee, declare as follows:

1. I am the Environmental Manager of General Dynamics NASSCO ("NASSCO") in San Diego, California. I am authorized to make this affidavit on behalf of NASSCO. The matters set forth below are within my personal knowledge, to which I could and would testify competently if called upon to do so.

2. I have read the Order For Clean Water Act Section 401 Water Quality Certification ("401 Certification") for United States Environmental Protection Agency Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels ("Vessel General Permit") issued on December 17, 2008 and know its terms and requirements.

3. The State Water Resources Control Board ("State Water Board") issued a Public Notice of Application for Water Quality Certification on August 27, 2008. NASSCO did not submit comments regarding the Draft Vessel General Permit because the notice did not include any conditions in addition to the terms of the Vessel General Permit, and the State Water Board did not release any information pertaining to the 401 Certification requirements during the 21-day comment period. Despite contacting State Water Board staff since early November, 2008, NASSCO and its representatives did not receive an advance copy of the 401 Certification at any time prior to its date of issuance on December 17, 2008 and had no indication that the additional terms and conditions in the 401 Certification would dramatically expand the requirements of the Vessel General Permit.

5. NASSCO will suffer substantial harm if a stay of the 401 Certification is not granted. NASSCO can not implement the sampling, testing and other conditions required in the

401 Certification by February 6, 2009, the effective date of the Vessel General Permit. Of the 28 regulated discharges, 20 of them are required to be sampled and at least 8 of those discharge locations can not currently be sampled and will require modifications to the vessel to physically allow for sampling. Modifications to systems on ships must first be approved by ABS, the regulating entity for ship construction. This process can not be accomplished by the effective date of the 401 Certification.

6. Granting a stay of the 401 Certification will not present an immediate or substantial harm to public health, safety or the environment because the provisions of the USEPA Vessel General Permit will remain valid while the State Water Board evaluates the feasibility of the 401 Certification requirements, and because these discharges have been entirely exempt from regulation for more than 35 years since the Clean Water Act regulations were first promulgated.

7. There are significant technical questions that must be resolved prior to the implementation of the Vessel General Permit. Compliance with the 401 Certification requirements as currently written is infeasible due to the lack of clarity in regards to the frequency of sampling, laboratory analysis, and reporting required for any of 28 different discharges, and because there is insufficient time before the Vessel General Permit becomes effective to comply with the conditions in the 401 Certification.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct.

Executed on 1/16/09 at San Diego, California.

Mark Lee

State of California
County of San Diego

On 1/16/09 before me,

Jacquelyn Johnson, personally

appeared Thomas Michael Chee

who proved to me on the basis of satisfactory evidence to be the person~~(s)~~ whose name~~(s)~~ is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity~~(ies)~~, and that by his/~~her/their~~ signature~~(s)~~ on the instrument the person~~(s)~~, or the entity upon behalf of which the person~~(s)~~ acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

Jacquelyn Johnson

(Seal)

